

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DERRICK JOHNSON, et al.,

Plaintiff,

v.

U.S. BANCORP, et al.,

Defendants.

CASE NO. C11-02010 RAJ

ORDER GRANTING IN PART
AND DENYING IN PART NON-
PARTY CHRISTOPHER HEMAN
AND DEFENDANTS' MOTION
FOR A PROTECTIVE ORDER RE
AT&T SUBPOENA

INTRODUCTION

This matter comes before the court on non-party Christopher Heman and defendants U.S. Bancorp, U.S. Bank National Association d.b.a. U.S. Bank, John Doe 1, John Doe 2, Jane Doe 1, and Jane Doe 2's ("Defendants" or "U.S. Bank")¹ motion for a protective order re AT&T subpoena. Dkt. # 49. Plaintiffs Derrick Johnson and Amy Johnson ("Plaintiffs") oppose the motion. Dkt. # 50.

Having reviewed the memoranda, exhibits, and the record herein, the court GRANTS in part and DENIES in part Defendants' motion for protective order.²

¹ For ease of use, the court will refer to the moving parties collectively as "Defendants," even though Mr. Heman is a non-party.

² Defendants request that the court strike the "hearsay statements" contained in Plaintiffs' briefing at "Dkt. 50, 3:9-18; 4:5-5:2; Dkt. 51, ¶¶ 4, 9 and 10 and Ex. 5, ¶ 2." Dkt. # 52 at 4 n.1.

BACKGROUND

In August 2007, U.S. Bank fired Mr. Johnson. Dkt. # 40 (AC) ¶ 3.3. He subsequently filed a claim with the Occupational Health and Safety Administration (“OSHA”) of the United States Department of Labor (“DOL”). *Id.* In his OSHA complaint, Mr. Johnson alleged that his termination from U.S. Bank was unlawful under the whistleblower provisions of SOX, 18 U.S.C. § 1514A (“administrative case”). Dkt. ## 40 ¶ 3.3; 43-1 (Ex. A to RJN).

In April 2008, Mr. Johnson began employment with KeyBank. Dkt. # 40 ¶ 4.2.

On May 7, 2010, OSHA notified U.S. Bank that it intended to enter findings favorable to Mr. Johnson in the administrative case,³ and on May 13, 2010, Plaintiffs filed a lawsuit against U.S. Bank that was ultimately removed to federal district court (“*Johnson I*”).⁴ Dkt. ## 40-2; 40 ¶ 3.3.

In May 2010, Mr. Johnson was called into a meeting with several KeyBank employees. Dkt. # 40 ¶ 4.3. At that meeting, the employees confronted Mr. Johnson

The court is not deciding a motion for summary judgment. The court may consider hearsay on a motion for protective order. *See Becker v. Precor, Inc.*, Case No. C08-1755-RAJ, 2009 WL 3013656, at * 3 n.1 (W.D. Wash. Sept. 16, 2009); *Costanich v. Dep’t of Soc. & Health Svcs.*, Case No. C05-0090-MJP, 2007 WL 3356774, at *1 (W.D. Wash. Nov. 7, 2007). The court therefore declines to strike these portions of Plaintiffs’ briefing.

Defendants also ask that the court strike exhibit 4 of Plaintiffs’ response, explaining that the document contained therein was filed under seal and remains sealed pursuant to a protective order in *Johnson et al. v. U.S. Bancorp et al.*, Case No. C10-960-RSM (*Johnson I*). Dkt. # 52 at 4 n.1. The court DENIES Defendants’ request to strike this exhibit. If Defendants wish for this document to be sealed in the current case, they must file a motion to seal pursuant to Local Rules W.D. Wash. CR (“LCR”) 5(g).

³ Defendants appealed OSHA’s ruling, and a hearing was held before a DOL administrative law judge (“ALJ”) on April 30 through May 12, 2012. On October 29, 2012, the ALJ issued a decision and order in favor of Mr. Johnson. *In re: Derrick Johnson v. U.S. Bankorp[sic] et al.*, Case No. 2010-SOX-00037, available at <http://www.oalj.dol.gov/>.

⁴ On July 15, 2011, Judge Martinez granted U.S. Bank’s motion to dismiss. *Johnson I*, Case No. C10-960-RSM, Dkt. # 126. The Ninth Circuit Court of Appeals affirmed the dismissal with prejudice on August 21, 2012. *Johnson et al. v. U.S. Bancorp et al.*, 476 Fed. Appx. 148 (9th Cir. 2012) (unpub.).

1 regarding an anonymous complaint that had been lodged against him. *Id.* According to
 2 Mr. Johnson, “[t]he KeyBank employees indicated that they had information that Plaintiff
 3 Johnson was targeting elderly bank customers During the questioning, KeyBank
 4 employees asked Plaintiff Johnson about a previous customer of US Bank named
 5 ‘Robert,’ alleging that the ‘anonymous complainant’ indicated that Plaintiff Johnson had
 6 unlawfully taken money from and abused his relationship with this client.” *Id.* KeyBank
 7 would not disclose who had made the allegations. *Id.* ¶ 4.4. Mr. Johnson asserts that
 8 these allegations were false, but that he was nevertheless “repeatedly targeted, harassed
 9 and retaliated against by KeyBank personnel” over the next few months. *Id.* ¶¶ 4.4-4.5.

10 On September 27, 2010, during a deposition in the administrative case, U.S.
 11 Bank’s attorneys presented Mr. Johnson with an unsigned document dated January 2,
 12 2008. *Id.* ¶ 4.6. The document contained allegations regarding Mr. Johnson’s
 13 mistreatment of an elderly U.S. Bank client named “Robert”—the same allegations that
 14 KeyBank employees confronted Mr. Johnson with four months earlier. *Id.*

15 Plaintiffs filed the instant case on December 5, 2011. Dkt. # 1. On September 24,
 16 2012, Plaintiffs’ counsel issued a subpoena to AT&T requesting all of Mr. Heman’s
 17 telephone records (incoming and outgoing calls) from January 1, 2007, through the
 18 present. Dkt. # 49-1 at 6. The subpoena indicated that the records were to be produced
 19 by October 3, 2012. *Id.*

20 ANALYSIS

21 A. Standing

22 Plaintiffs argue that Defendants have no standing to bring this motion on behalf of
 23 Mr. Heman, and that Defendants may seek to quash the subpoena issued to Mr. Heman
 24 only if U.S. Bank “asserts a legitimate privacy interest” in the cell phone records. Dkt.
 25 # 50 at 7 (citing *Abu v. Piramco Sea-Tac Inc.*, Case No. C08-1167-RSL, 2009 WL
 26 279036, at *1 (W.D. Wash. Feb. 5, 2009)).

1 Although Defendants refer to Mr. Heman as a “non-party” in the caption of their
2 motion, they go on to argue with regard to Mr. Heman that “a party has standing when he
3 asserts a legitimate privacy interest in the material sought by a subpoena.” Dkt. # 52 at 2.
4 However, Defendants further argue that U.S. Bank itself has standing due to the fact that
5 Mr. Heman is an officer of U.S. Bank and used his personal cell phone for U.S. Bank
6 business calls, and therefore “U.S. Bank . . . has standing to protect its own confidential
7 business information that may be revealed through disclosure of Mr. Heman’s business
8 phone calls.” *Id.*

9 A party has standing to challenge a subpoena issued to third parties where its own
10 interests may be implicated. *See, e.g., Koh v. S.C. Johnson & Son, Inc.*, Case No. C09-
11 00927-RMW, 2011 WL 940227, at *2 (N.D. Cal. Feb. 18, 2011); *Adams v. United States*,
12 Case No. C03-0049-E-BLW, 2010 WL 55550, at *3 (D. Idaho Jan. 5, 2010). The court
13 finds that because Mr. Heman is an officer of U.S. Bank, and because U.S. Bank’s own
14 privacy interests may be implicated, Defendants have standing to bring this motion.

15 **B. Meet and Confer Requirement**

16 On August 21, 2012, counsel for Plaintiffs and Defendants met and conferred via
17 telephone regarding a prior subpoena for cell phone records that Plaintiffs’ counsel
18 served on T-Mobile. Dkt. # 49 at 5. At that time defense counsel indicated that she
19 objected to the subpoena on the grounds that it would invade the privacy of Mr. Heman
20 and others. Dkt. # 49-1 at 2 ¶ 3. However, defense counsel subsequently determined that
21 Mr. Heman did not have an account with T-Mobile and thus did not file a motion for a
22 protective order. Dkt. # 49 at 6.

23 Plaintiffs then issued a subpoena to AT&T with a production date of October 3,
24 2012. Dkt. # 49-1 at 6. On September 30, 2012, counsel for Defendants sent counsel for
25 Plaintiffs an email asking to meet and confer regarding the AT&T subpoena. *Id.* at 23.
26 Alternatively, counsel requested that the response date be continued if Plaintiffs’ counsel
27

1 was not available to speak prior to the production date. *Id.* Counsel for Plaintiffs did not
 2 respond,⁵ and Defendants filed this motion on October 2, 2012. *Id.* at 3 ¶ 6.

3 **C. Legal Standard**

4 The Federal Rules of Civil Procedure allow for broad discovery. *See* Fed. R. Civ.
 5 P. 26(b)(1); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993). “[W]ide access to
 6 relevant facts serves the integrity and fairness of the judicial process by promoting the
 7 search for the truth.” *Shoen*, 5 F.3d at 1292. However, discovery should not be used as a
 8 means to conduct a “fishing expedition,” and must be “reasonably calculated to lead to
 9 the discovery of admissible evidence.” *Rivera et al. v. Nibco, Inc.*, 364 F.3d 1057, 1072
 10 (9th Cir. 2004) (citation omitted); Fed. R. Civ. P. 26(b)(1). District courts have a great
 11 deal of discretion in controlling the discovery process. *See Empire Blue Cross & Blue*
 12 *Shield et al. v. Janet Greeson’s A Place for Us Inc. et al.*, 62 F.3d 1217, 1219 (9th Cir.
 13 1995). A court may “issue an order to protect a party or person from annoyance,
 14 embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c)(1).
 15 However, the party seeking such order must demonstrate good cause as to why the order
 16 should be granted, specifying the particularized prejudice or harm that will result if it is
 17 not. *See id.*; *Phillips v. General Motors Co.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002).

18 **D. Legitimate Purpose**

19 Defendants argue that the time scope of the AT&T subpoena is overly broad and
 20 “confirms that Plaintiffs have not even tried to tether it to the allegations in the Amended
 21 Complaint.” Dkt. # 49 at 8. Defendants point out that U.S. Bank terminated Mr.

22 ⁵ Plaintiffs’ counsel uses her surreply to argue that she “saw no reason to have a second
 23 discussion as we had already conferred and there was no difference in the information
 24 requested.” Dkt. # 54 at 2. The court first notes that this is an improper use of the surreply—
 25 argument is to be limited solely to the issue of Defendants’ motion to strike. LCR 7(g)(2).
 26 Furthermore, this is an insufficient excuse for failing to comply with meet and confer
 27 requirement. Future violations of this rule will result in sanctions. *See* LCR 26(c)(1) (“If the
 court finds that counsel for any party . . . willfully refuses to confer, fails to confer in good faith,
 or fails to respond on a timely basis to a request to confer, the court may take action as stated in
 LCR 11 [of the Local Civil Rules].”

1 Johnson's employment in August 2007, Rachael Johnson wrote her letter in 2008, Mr.
2 Johnson began his employment at KeyBank in April 2008, the alleged retaliation against
3 Mr. Johnson began in May 2010, and Mr. Johnson resigned from KeyBank in October
4 2010. *Id.* at 9. Defendants argue that because Plaintiffs' lawsuit alleges causes of action
5 occurring while Mr. Johnson was employed by KeyBank, any cell phone records outside
6 of the time period of his employment are neither "directly relevant" nor "reasonably
7 calculated to lead to the discovery of admissible evidence." *Id.* at 8-9 (citing Fed. R. Civ.
8 P. 26([b])(1)).

9 Plaintiffs contend that they are seeking the cell phone records both "to show
10 contact between Mr. Heman and KeyBank," and "to find other evidence relating to Mr.
11 Heman's motives, animus intent and for impeachment purposes." Dkt. # 51 ¶ 13.
12 Plaintiffs argue that "Mr. Heman's intentions and animus toward Mr. Johnson are
13 relevant not only in relation to the time frame of the KeyBank incidents but those that
14 occurred prior as well." Dkt. # 50 at 9. They further argue that "[w]ho [Mr. Heman]
15 contacted" between January 2007 until the present is relevant because "it can be used for
16 impeachment purposes" and "likely . . . goes to [his] state of mind." *Id.* at 8. Plaintiffs
17 concede, however, that they have "no means of obtaining the content of his
18 conversations." *Id.* at 9.

19 The court finds that the relevant timeframe during which Mr. Heman allegedly
20 contacted KeyBank is April 2008 through October 2010, when Mr. Johnson was
21 employed by KeyBank. Plaintiffs' request for Mr. Heman's cell phone records during
22 this time period is "reasonably calculated" to lead to the discovery of this evidence.
23 Conversely, the court finds that Plaintiffs have failed to adequately articulate the
24 relevance of Mr. Heman's cell phone records beyond this timeframe.

25 **E. Right to Privacy**

26 Defendants argue that Mr. Heman "is entitled to a constitutional right of privacy,"
27 and cite article I, section 7 of the Washington constitution. Dkt. # 49 at 8. Defendants

1 cite no further authority supporting their argument that this constitutional provision
2 applies in this particular situation. *Id.* Defendants further argue that production of the
3 cell phone records will result in “embarrassment and harassment” to Mr. Heman and his
4 “friends, family members, [and] business acquaintances.” *Id.*; Dkt. # 49-2 ¶ 4.
5 Defendants express particular concern about disclosure of the phone numbers of Mr.
6 Heman’s personal friends, children, and medical providers, and request that they “be
7 permitted to redact all personal telephone numbers” if this court denies their motion in
8 whole or in part. Dkt. # 49 at 8, 11; Dkt. # 49-2 ¶ 3.

9 Under the Federal Rules of Civil Procedure, “there is no generic ‘privacy’
10 privilege.” *Tubar v. Clift*, Case No. C05-1154-JCC, 2007 WL 214260, at *3 (W.D.
11 Wash. Jan. 25, 2007) (citing Fed. R. Civ. P. 26(c)). However, this district has assumed
12 without deciding that “there could be some privacy interest cognizable under federal law”
13 with regard to phone records, and has found that “any applicable privacy interests can be
14 protected by limiting” both the scope of the records disclosed and “access to the
15 information therein.” *Id.* at *3-4.

16 The court finds that in addition to limiting the time scope of the records as
17 discussed above, it is also appropriate to limit the scope of how they may be used.
18 Plaintiffs may use the records solely for the purpose of identifying the names associated
19 with the telephone numbers, as explained in Plaintiffs’ response brief. Dkt. # 50 at 6.
20 *Plaintiffs and anyone associated with Plaintiffs may not call any of the telephone*
21 *numbers.* Additionally, the parties are ORDERED to enter a protective order pursuant to
22 LCR 26(c) limiting disclosure of the phone records to counsel and persons necessary for
23 and associated with this litigation.

24 **F. Other Means of Obtaining Information**

25 Defendants argue that even if the information contained within Mr. Heman’s cell
26 phone records is relevant, it can be obtained through other, less burdensome means. Dkt.
27 # 49 at 10. Defendants argue that Plaintiffs have deposed Mr. Heman in previous

1 litigation and will likely do so again in this case, and thus Plaintiffs will have the
2 opportunity to ask him questions regarding his contacts with KeyBank employees. *Id.*
3 They further argue that the burden of this discovery outweighs the benefit, “considering
4 the needs of the case and the importance of the discovery in resolving the issues.” *Id.*
5 (citing Fed. R. Civ. P. 26(b)(2)(C)(iii)).

6 The court is not persuaded that a deposition is an adequate substitute for the
7 relevant phone records sought by Plaintiffs, nor that producing the phone records will be
8 unduly burdensome on Defendants or on AT&T, the producing entity. “[T]he discovery
9 of phone records is commonplace in litigation” *Perez-Farias et al. v. Global*
10 *Horizons, Inc. et al.*, Case No. C-05-3061-MWL, 2007 WL 991747, at *3 (E.D. Wash.
11 Mar. 30, 2007).

12 CONCLUSION

13 For all of the foregoing reasons, the court GRANTS in part and DENIES in part
14 Defendants’ motion as follows:

15 (1) Defendants’ motion is GRANTED with regard to the AT&T subpoena for Mr.
16 Heman’s cell phone records from January 1, 2007, through March 31, 2008, and
17 November 1, 2010, through the present.

18 (2) Defendants’ motion is DENIED with regard to the AT&T subpoena for Mr.
19 Heman’s cell phone records from April 1, 2008, through October 31, 2010.

20 (3) Defendants’ request to redact personal phone numbers is DENIED.

21 (4) The parties are ORDERED to file a protective order pursuant to LCR 26(c) no
22 later than January 9, 2013.

23 (5) Within seven (7) days of the court’s entry of the protective order, AT&T must
24 produce responsive records subject to the court’s limitations.

1 Dated this 26th day of December, 2012.

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5 The Honorable Richard A. Jones
6 United States District Judge
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